SUPREME COURT, U. S.

No. 73-237

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In the Supreme Court of the United States

OCTOBER TERM, 1973

OLIVER M. HENDRICKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

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In prior litigation petitioner unsuccessfully challenged a determination by the Secretary of the Interior that a sand and gravel placer mining claim made by petitioner in 1953 on public lands in the Squaw Valley area of Tahoe National Forest was null and void on the ground that the lands were not mineral in character, as petitioner claimed. *Henrikson* v. *Udall*, 350 F. 2d 949 (C.A. 9), certiorari denied, 384 U.S. 940. Following this Court's denial of certiorari in that case, the United States instituted this action on August 25, 1966, to eject the petitioner from public lands located within the boundaries of petitioner's prior mining claim. Subsequently, on December 15, 1967, petitioner filed with Department of the Interior a "millsite" claim on the same public lands pursuant to 30 U.S.C. 42(b), enacted in 1960 to permit

such claims to be made on "nonmineral" land in connection with the operation of a placer mining claim.[1]

The district court entered summary judgment against the petitioner, awarding possession of the land to the United States and retaining jurisdiction to ascertain the damages sustained by the United States. The district court's decision was based primarily on the fact that the lands had been withdrawn from all public appropriation on March 12, 1959, by Public Land Order No. 1817, 24 Fed Reg. 1984.

The court of appeals affirmed, holding that petitioner's 1967 millsite claim failed as a matter of law and that the district court had jurisdiction over the action despite the pendency of petitioner's millsite claim before the Department of the Interior.

1. The court of appeals' ruling that the pendency of petitioner's millsite claim did not oust the district court of jurisdiction was correct and not in conflict with any other court of appeals decision.[2] Petitioner's reliance on the prior decision of the court of appeals in *Adams* v. *United States,* 318 F. 2d 861 (C.A. 9), is misplaced, because, as the court of appeals observed here, "[t]he issues in that case were entirely different * * *" (Pet. App. xvi). In *Adams* the invalidity of the mining claim in national forest lands had been finally determined by the Department of the Interior and the

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[1] The millsite claim is near another placer mining claim of petitioner's which has been patented, and was filed in conjunction with an amended notice of location of a placer mining claim.

[2] Petitioner's arguments with respect to the Administrative Procedure Act (Pet. 9) are entirely irrelevant in this action commenced by the United States to vindicate its rights in its own lands.

court held only that the claimint could not obtain a *de novo* judicial determination of the validity of the claim in an action by the United States to enjoin the claimant from continuing to use the lands.

As the court of appeals made clear in *United States* v. *Nogueira*, 403 F. 2d 816 (C.A. 9), the pendency of a mining or related claim before the Department of the Interior does not affect the district court's jurisdiction to dispose of an ejectment action brought by the United States in which the pending claims are asserted as a defense. At best, the pendency or availability of administrative proceedings concerning the validity of such claims is a factor to be considered by the court in determining whether it would be appropriate to abstain and defer a final ruling until the agency has made its determination. Abstention might avoid duplicative proceedings and permit the court to obtain the benefit of having complex or specialized factual issues resolved by a body with particular expertise or competence concerning such issues. Cf. *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 338.

The doctrine of abstention, however, has obvious limits. If it were applied overly mechanically in situations like that in the instant case, a means would exist, as the court of appeals noted, whereby one using government lands "could keep the United States out of the possession of its property for an indefinite period of time by filing one claim after another" (Pet. App. xvii). The need for and propriety of abstention are also lessened when, as we show below, it is clear that as a matter of law, on which the courts are the final arbiters, the pending claim is invalid.

2. The court of appeals correctly affirmed the district court's summary judgment that, as a matter of law,

petitioner had no valid millsite claim. Prior to 1960, a millsite claim could not be made in connection with a placer mining claim, 74 Stat. 7 (1960), 30 U.S.C. 42(b), so that petitioner could not before then have acquired any rights in the land in connection with his alleged use of the land as a millsite. In addition, petitioner could not acquire the right to a millsite claim to the lands after enactment of 30 U.S.C. 42(b) because these particular lands were withdrawn from appropriation in 1959. Finally, petitioner's millsite claim, which can only be made as to nonmineral land, is inconsistent with the position he took—from the asserted location of his mining claim in 1953 until the conclusion of his prior litigation in 1966—that the same land was mineral in character.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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